***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

# 76-7076

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In The

## United States Court of Appeals

For The Second Circuit



MILDRED A. McLEARN,

*Plaintiff-Appellant,*

*vs.*

COWEN & CO., MERRILL LYNCH PIERCE FENNER & SMITH, INCORPORATED, BARRETT SINIWITZ and LEONARD FUCHS, individually,

*Defendants-Appellees.*

*On Appeal from the United States District Court for the Southern District of New York*

**BRIEF FOR DEFENDANT-APPELLEE COWEN & CO.**

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FOR THE SECOND CIRCUIT

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-against- :

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Defendants-Appellees. :

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## PRELIMINARY STATEMENT

On January 12, 1976, Hon. Charles H. Metzner dismissed plaintiff's Amended Complaint holding that it failed to set forth the facts and circumstances of the alleged fraud with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure (Rec. 3a-5a).

## QUESTION PRESENTED

Whether the decision below holding that the Amended Complaint failed to plead the facts and circumstances of the alleged fraud with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure should be affirmed?

## STATEMENT OF THE CASE

### The Proceedings to Date

This action was commenced on March 31, 1975 with the filing of a Complaint ("Original Complaint") consisting of one hundred and three paragraphs and totaling thirty-nine pages. On the same date, the Summons and Original Complaint were served on Cowen & Co. ("Cowen") a brokerage house through which plaintiff and two of her adult children purchased or sold certain securities during the period 1971-1972. While plaintiff also served defendant Merrill Lynch Pierce Fenner & Smith, Incorporated ("Merrill Lynch") it did not serve the individual defendants Barrett Siniwitz and Leonard Fuchs.

By Notice of Motion dated April 21, 1975, Cowen moved for an Order dismissing the Original Complaint on the ground that it did not state with the requisite particularity the facts and circumstances surrounding plaintiff's allegations. Defendant Merrill Lynch joined in the motion.

By Order entered July 31, 1975, the Court, below, per Metzner, J., dismissed the Original Complaint with leave to the plaintiff to file an amended Complaint within twenty

days. In dismissing the Original Complaint, the Court, inter alia, held that:

> "The complaint runs thirty-nine pages and in one hundred three paragraphs sets forth eight counts, all in general terms alleging a fraud based on breach of fiduciary duty and tracing the boilerplate language of the statutes and regulations involved.
>
> Plaintiff contends that '[t]he complaint sets forth, in great detail, plaintiff's position.' I agree that it sets forth plaintiff's position but not the facts and circumstances constituting the alleged fraud. That is what is required, and that is what plaintiff has failed to allege with particularity. Bare conclusory allegations of fraud are insufficient." (Citations omitted.)

No appeal was or is being taken by plaintiff from this decision.

Pursuant to the Court's Order, Plaintiff had twenty days within which to file an Amended Complaint. Plaintiff, however, moved for an extension of time to do so. In his affidavit in support of that motion, plaintiff's attorney urged that this extension was necessary because:

> "The decision of this Court requiring the plaintiff to serve an amended complaint will necessitate your deponent and the plaintiff completely revamping and reconstructing the complaint to aver the allegations of fraud with the requisite particularity."

Nevertheless, when served, the Amended Complaint was virtually identical to the Original Complaint except, that instead of being 39 pages, it had somehow become 44 pages without containing any additional specification of the facts and circumstances surrounding the plaintiff's claims. With respect to the claims against Cowen the Amended Complaint reads exactly the same as did the Original Complaint with the exception of a sprinkling of insignificant linguistic changes in paragraphs EIGHTEENTH, TWENTY-EIGHTH, FIFTY-NINTH, SIXTY-NINTH, SEVENTY-SEVENTH and EIGHTY-SEVENTH. These "changes", however, were ones of semantics rather than of substance, and by Notice of Motion dated November 12, 1975 (Rec. 57a-58a), Cowen moved to dismiss the Amended Complaint. Merrill Lynch did likewise. (Rec. 52a-56a)

On January 12, 1976, the Court below, per Metzner, J., granted the motion to dismiss, (Rec. 3a-5a) holding in part that:

> "The amended complaint fails to correct the deficiencies of the original one. All but eight of its 103 paragraphs are taken verbatim from the original complaint. In the other eight, plaintiff has merely added more conclusory allegations and restated those of the original complaint. It is replete with references to 'failure to exercise prudent judgment,' and 'acting in bad faith,' etc. The changes are in language rather than in substance. The

> complaint still fails to set forth the facts and circumstances of the alleged fraud and must be dismissed. Felton v. Walston and Co., Inc., 508 F.2d 577 (2d Cir. 1974); Segal v. Gordon, 467 F.2d 602 (2d Cir. 1972).
>
> Plaintiff contends that she has pleaded every fact known to her and that much of the information about the alleged fraud is within the knowledge of defendants. This does not excuse her failure to plead with the requisite particularity. A complaint 'should serve to seek redress for a wrong, not to find one.' Segal v. Gordon, supra, at 608.
>
> The amended complaint is dismissed." (Rec. 4a)

The present appeal from that Order followed.

## The Amended Complaint

The Amended Complaint purports to state eight causes of action for alleged violations of the federal securities laws. Of these eight causes of action, five appear to be directed primarily against Cowen. These five purported causes of action seek an aggregate of $10,000,000 in damages. The remaining three purported causes of action appear to be directed principally against Merrill Lynch.

In the first cause of action it is alleged that plaintiff was "approached" by defendant Barrett Siniwitz

("Siniwitz") who, it is then alleged, introduced the plaintiff to defendant Leonard Fuchs ("Fuchs"). Thereafter, plaintiff contends, these two individuals and Cowen "insisted" that plaintiff enter into a customers agreement with Cowen, "insisted" that such agreement include a complete power of attorney for Fuchs and Cowen and "induced" her into so doing. (Compl. pars. Ninth-Eleventh; Rec. 9a-10a)

How Cowen "insisted" and "induced" plaintiff to do this is not set forth in the Amended Complaint and such allegation is, in fact, inconsistent with plaintiff's averment that she had "consider[ed] the aforementioned investment arrangement." (Compl. par. Tenth; Rec. 9a) The Amended Complaint further alleges that after this "arrangement" was entered into -- and in common with most other American investors during the 1971-73 period -- plaintiff's investments "commenced dwindling in value" and continued to do so. (Compl. par. Seventeenth; Rec. 11a)

Beyond these barebone contentions, the first cause of action is bereft of any factual allegations. Instead, it is alleged in a conclusory manner that Cowen -- in at least 24 conclusorily stated ways -- breached an undefined "fiduciary obligation" purportedly owed to plaintiff. (E.g.,

"[F]ailing to establish a system for monitoring adverse developments so as to allow defendants to make appropriate decisions when adverse developments are perceived"; "act[ing] in bad faith"; "making untrue representations.") (Compl. par. Eighteenth; Rec. 11a-13a).

The second cause of action alleges a conspiracy on the part of Cowen and Messrs. Siniwitz and Fuchs to commit the acts alleged in the first cause of action. (Compl. par. Twenty-fifth - Twenty-ninth; Rec. 14a-17a)

The Fourth, Fifth, Sixth and Seventh causes of action brought against the same defendants are essentially similar to the first two except that they are made by plaintiff as assignee on behalf of her son and daughter. (Compl. par Fifty-second - Eighty-eigth; Rec. 27a-43a)

Apparently, plaintiff is unhappy because she believes that the value of her investments "dwindled". However that may be, she has failed to allege any specific conduct on the part of Cowen which caused the "dwindling of her investments" or which was improper in any manner. Thus, while plaintiff claims that Cowen failed to advise her that the stocks purchased for her account "involved substantial

risk" and were "speculative in nature" she does not allege what risks were involved, of what risks she was not advised or in what manner the stocks were speculative; plaintiff does not even allege which stocks are, in fact, involved.

Likewise, while plaintiff alleges that defendant made "untrue representations concerning the condition of plaintiff's account by repeatedly informing plaintiff that her account was in good financial condition" and that defendant "repeatedly omit[ted] to inform plaintiff of material facts with respect to securities recommended" she fails to allege what "untrue representations" were made, and what information was not disclosed to here let alone that any of these alleged untruths or omissions were material. In short, nowhere does she identify what acts or omissions of Cowen (or of the other defendants, for that matter) allegedly give rise to her staggering $10,000,000 claim. Only vague, contradictory and conclusory allegations of wrongdoing are made; no specific conduct is alleged on Cowen's part that is in any way inconsistent with the proper, customary and general practice of a stock broker.

## ARGUMENT

### PLAINTIFF HAS FAILED TO ALLEGE WITH THE REQUISITE SPECIFICITY HER ALLEGATIONS OF FRAUD

It is settled law in this Circuit that broad, conclusory allegations of fraud are insufficient to support a Complaint, much less a judgment, under § 10b, Rule 10b-5 and F.R.C.P. Rule 9(b). Segal v. Gordon, 467 F.2d 602, 607 (2d Cir. 1972) ("Mere conclusory allegations to the effect that defendant's conduct was fraudulent or in violation of Rule 10b-5 are insufficient" quoting from Shemtob v. Shearson, Hammill & Co. Inc., 448 F.2d 442 (2d Cir. 1971)); O'Neill v. Maytag, 339 F.2d 764, 768 (2d Cir. 1964) ("[T]here must be allegation of facts amounting to deception in one form or another; conclusory allegations of deception or fraud will not suffice").

In Felton v. Walston and Co., Inc., 508 F.2d 577, 581 (2d Cir. 1974), this Court, in affirming the dismissal of a Complaint as against certain defendants stated that:

> "Simply denominating unspecified statements as 'deceptive' and corporations as 'worthless' is not enough. Some further explanation of the allegations is necessary to indicate how they constitute fraud. The district court correctly concluded that these allegations failed to satisfy rule 9(b)." (Citation omitted)

And, in Segan v. Dreyfus Corporation, 513 F.2d 695, 696 (2d Cir. 1975) where a complaint identified only one transaction in a scheme claimed to stretch over several years, this Court held that "[i]t utterly fails to comply with Rule 9(b)."

The instant Amended Complaint - although admittedly prolix - completely fails to satisfy these settled requirements. Nowhere are any facts pleaded which set forth with particularity the fraud alleged. Nowhere are the circumstances of the alleged wrongdoing set forth. All that plaintiff has done is to track what she believes to be the magic words of the federal securities laws. However, talismanic words do not take the place of facts. As this Court stated in Segal v. Gordon, 467 F.2d 602, 608 (2d Cir. 1972):

> "A complaint cannot escape the charge that it is entirely conclusory in nature merely by quoting such words from the statute as 'artifices, schemes and devices to defraud' and 'scheme and conspiracy.'"

Plaintiff contends that because the corporate defendants allegedly have more information available to them than she does, it should be excused from complying with the requirements of F.R.C.P. 9(b). (Br. 7-8) Even if this were

true (which it is not) this does not excuse her failure to comply with F.R.C.P. 9(b). As Judge Metzner held below:

> "A complaint 'should serve to seek redress for a wrong, not to find one'." (Rec. 4a) (Citation omitted)

Plaintiff also argues that since she has provided all the "facts" within her knowledge that alone is sufficient to establish compliance with Rule 9(b). Plaintiff's reliance on Seligson v. Plum Tree, Inc., 61 F.R.D. 343 (E.D. Pa. 1973) for support for this erroneous proposition is misguided. Plaintiffs in Seligson, an antitrust action, provided information concerning the time period in which the alleged misrepresentations were made, the medium in which such misrepresentations were made, the persons by whom the misrepresentations were made and the substance and nature of the alleged misrepresentations by reference to specific advertisements and financial statements.

The contrast between that case and the instant one is like night and day. Here only the vaguest kind of generalized and conclusory allegations are made. Although plaintiff admits that she has "set forth each and every fact and circumstance known to her", she has been unable to

allege a single misleading statement made by Cowen or any of its employees or to set forth the circumstances of the supposed fraud. Admittedly, she alleges that Cowen "insisted" and "induced" here into entering some sort of "illegal and unethical agreement," but nothing is said to suggest that the agreement was anything other than a standard customer's margin agreement or that Cowen merely lawfully offered its services as a brokerage house.

The requirement that averments of fraud be made with particularity is a settled and sound one. Its appropriateness here is patent. Plaintiff admits that she has pleaded and "set forth each and every fact and circumstance known to her". (Br.6 ) In this Cowen fully concurs. Plaintiff has not set forth any more details of fraud because none exist. Plaintiff is unhappy that some of her investments went down in value during a recession, when almost everyone's stocks did likewise. But the fact that she maintained an account with Cowen and that her stocks "dwindled" in value alone does not amount to a securities act violation. The District Court correctly dismissed her Amended Complaint.

## CONCLUSION

The decision of the Court below dated January 12, 1976, should be affirmed in all respects.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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Appellant,

-against-

COWEN & CO., MERRILL LYNCH PIERCE FENNER & SMITH, INCORPORATED, BARRETT SINIWITZ and LEONARD FUCHS, individually,

Appellees.

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AFFIDAVIT OF SERVICE BY MAIL

STATE AND COUNTY OF NEW YORK ) ss.:

The undersigned, being duly sworn, deposes and says:

That he is over the age of 18 years and that he is employed by Willkie Farr & Gallagher, attorneys for Cowen & Co.

That on the 12th day of May, 1976, he served the Annexed Brief of Appellee, Cowen & Co., upon the attorneys listed below by depositing 2 true copies of the same securely enclosed in postpaid wrappers in a Post Office Box regularly maintained by the United States Postal Service at 1 Chase Manhattan Plaza, New York, N.Y., directed to each of said attorneys at the addresses set opposite their names, being the addresses within the state where they maintained their offices:

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Dominick David Monteverdi, Sr.

Sworn to before me this
12th day of May, 1976

Robin J. Elliott
Notary Public

ROBIN J. ELLIOTT
Notary Public, State of New York
No. 31-4529480
Qualified in New York County
Commission Expires March 30, 1978